Supreme Court of the United States

OCTOBER TERM, 1946

No. 874

MAX LOUIS PESKOE,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A REHEARING OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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he Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

'he petitioner, Max Louis Peskoe, presents his petition a rehearing of his petition for certiorari in this case.

I.

Jurisdiction.

'he petition for certiorari was filed on January 10, , and was denied on March 3, 1947. This petition is within twenty-five (25) days thereafter, in accordwith Rule 33 of the Rules of this Court, following . S. C. Sec. 354.

II.

Reasons for Petition for Rehearing.

'he petition presents questions of the utmost gravity, ing to the allowable scope of the principle of con-

structive republication in prosecutions for knowingly making false statements, where the purpose is to extend the statute of limitations (18 U. S. C. Supp. § 582) and the intention to republish may be either imputed or fictitious. The questions transcend in importance the particular section of the Selective Training and Service Act, 50 U. S. C. App., Supp. V. Sec. 311, involved (see *Bartchay* v. *United States,* 319 U. S. 484) and affect the enforcement of the false claims provisions in Section 35(a) of the Criminal Code, 18 U. S. C. § 80, and in other federal statutes, in at least two major aspects:

1. Continuing misstatements;
2. Matters of opinion and judgment.

III.

Public Importance.

It is vitally important that the unprecedented crime of constructive republication be disavowed before it gains a foothold in our jurisprudence as a device for nullifying the statute of limitations, *Pendergast* v. *United States,* 317 U. S. 412, 418, and of even greater importance, that unless clear and unequivocal proof of criminal intent and guilt is presented, prosecutions of unprecise utterances as false statements knowingly made be discouraged by this Court, in the exercise of its power to supervise criminal proceedings in the lower federal courts. *McNabb* v. *United States,* 318 U. S. 332, 341. The conviction upheld by the courts below is a permanent stain on the integrity of the enforcement of the Selective Training and Service Act. It is supportable only if a laconic answer, literally true, may be expanded ad lib to support a conviction for reasserting a faulty conclusory statement made more than three years before the indictment was returned.

IV.

Miscarriage of Justice.

In addition to the public importance of the issues, great private injustice has been committed in sentencing petitioner for a year and a day for conduct that could not have been a crime, for (1) the letter of May 14, 1941 "could not support a prosecution begun on February 6, 1945, more than three years after its mailing" (R. 133, 157 F. (2) 935, 938) unless it were republished, and (2) on February 10, 1942, when a false statement is alleged to have been republished, the Draft Board either knew or had available from petitioner's disclosure all the facts on which petitioner's conclusion as to his military status was based (R. 43-45, 103).

The salient facts may be summarized as follows:

Petitioner after four years in the R. O. T. C. at Rutgers, had received a commission in 1929, which expired in 1934. It was then renewed until 1939. On May 14, 1941 he advised his Draft Board that he held "a commission of Second Lieutenant in the inactive reserve of the U. S. Army, having secured this Commission after the completion of four years R. O. T. C. at Rutgers University in 1929" (R. 23, 119). The board was not satisfied with this statement and by letter dated May 16, 1941 called for substantiation (R. 24, 111). As the court below concedes:

> "In response to this request the defendant brought with him to the office of the board on May 21, 1941, the commission which had been issued to him in 1934 and exhibited it to the clerk who interviewed him. The clerk examined the commission and then returned it to the defendant. By its terms the commission 'was to continue in force for a period of five years' from July 25, 1934. The clerk made the following notation on the May 16th letter as to the purport of the interview:

'May 21, 1941
4 Yrs R. O. T. C. training
Rutgers
Rec'd Commission 1929'

The letter with the above notation was included in the registrant's file and was available to the board members. It does not appear, however, that the clerk informed the members of the board that the defendant had exhibited a later commission than the 1929 one to which reference was made in her notation and that even this later commission expired by its terms in 1939.

"In the meantime, apparently on May 17, 1941, the board had placed the defendant in Class 1-C, a classification which was applicable to members of the armed forces. The next communication from the board was a letter dated February 6, 1942, in which appeared the following: 'We would thank you to advise us of your present status since the declaration of war.' The defendant's reply, dated February 10, 1942, consisted of the one sentence letter quoted in the indictment: 'My status has not been changed' " (R. 131-2, 157 F. (2) 935, 937).

The Court of Appeals further recognizes that petitioner might have requested deferment on the grounds of dependency, defective eye sight (20/800, R. 89) and essential occupation,[1] and that he might properly argue that "since there was no need for him to manufacture a ground for avoiding service in the light of his marital, physical and occupational circumstances, a reasonable inference would be that he wrote the two letters under a misconception as to the effect to be given a lapsed commission rather than with the intent to avoid service" (R. 132-3, 157 F. (2) at 938). However, it held that the

[1] As one with more than six years in the Officers' Reserve Corps, petitioner would have been placed in Class IV A in May, 1941 and have been exempt from service (R. 82-3).

trial judge was without authority to decide as a matter of law that defendant lacked criminal intent, and that only the jury was empowered to ascertain whether the letter of February 10, 1942, on which the prosecution was based, was intended to refer to the letter of May 14, 1941 or the interview of May 21, 1941, as though the references would be mutually exclusive. Thus, not only was there no falsification, but there was not even a genuine motive to falsify from which criminal intent could be imputed to a statement capable of innocent constructions.

V.

The Controlling Questions.

The controlling questions are whether, having regard to petitioner's course of dealing with the Draft Board:

(a) His letter of May 14, 1941, advising that he held "a Commission of Second Lieutenant in the inactive reserve of the U. S. Army" (R. 119) was a deliberately false statement of fact, as distinguished from an opinion, judgment, or conclusion, and

(b) Whether the disclosure made in the interview of May 21, 1941 could be ignored, and the letter of May 14, 1941, standing alone could be deemed republished by petitioner's letter of February 10, 1942 saying "My status has not been changed." Although the indictment (R. 3-4) is strangely silent on the point, the "republication" letter of February 10, 1942 was in response to, and at the foot of, the inquiry dated February 6, 1942 from the Chairman of the Draft Board saying "We would thank you to advise us of your present status since the declaration of war." This request would

appear to have been directed to obtaining information relating to elements of status that might have changed, such as occupation, marital status, dependency, etc., and not to defendant's military status. Petitioner's letter of February 10, 1942 was literally true in any view—there had been no change in his military status, whatever it may have been, after December 7, 1941, nor after May 14, 1941, for that matter.

Argument.

A. Since it is apparent that the Government would not have urged that the statement of May 14, 1941 was reasserted in February 1942 unless it believed that the original letter was glaringly false in fact, and the petitioner was fully aware of the falsity, we shall first demonstrate that the statement alleged to have been republished was not false in fact.

When a man must answer to the satisfaction of the Government's experts in military law a complicated status question of the mixed law and fact kind which has given rise to the doctrine of judicial immunity, at the risk of being found guilty of knowingly making a false statement by a jury neither equipped to determine the true answer and the *bona fides* of the actual answer, nor properly instructed by the Court, *a new engine of oppression is created.* Lawyers and judges may be wrong without being dishonest or knowingly making false statements. *Cf. Patterson* v. *Lamb,* 67 S. Ct. 448. As a matter of fact, although the trial judge charged the jury "I think there is no proof in the case that there was such a thing as the In-Active Reserves" (R. 103; see also R. 105), there is convincing proof to the contrary in the Brief for the United States in Opposition (pp. 5, 6, 12, 19):

> "• • • the Officers' Reserve Corps had an Inactive Reserve section for those who for a number of reasons were unavailable for active duty; • • •" (Br. in Opp. p. 12).

And while the prosecution came to the wrong conclusion in linking the letter of February 10, 1942 with that of May 14, 1941, instead of to the Draft Board's letter of February 6, 1942 to which it was appended and the interview of May 21, 1941 as well, petitioner does not impugn the prosecution's honesty or sincerity.

In the case at bar the statement allegedly republished concerned the military status of an ex-member of the Reserve Officers' Training Corps. If the facts were given in an objective test of the multiple-choice type, would no students have marked the wrong answer? Assuming that the proper designation after failure to renew a commission would be a matter on which unanimity would exist among the experts in the Judge Advocate General's Office, and that if a thousand ex-members were polled, only two or three would refer to themselves as in the "inactive reserve," or some equivalent thereof, we submit that no jury should be permitted to speculate that the blundering few had knowingly made a false statement, at least not until it had been fully and painstakingly instructed in the inherent pitfalls and dangers. *United States* v. *Route,* 33 Fed. 246 (E. D. Mo.); *United States* v. *Bittinger,* 24 Fed. Cas. No. 14599 (W. D. Mo.); *cf. United States* v. *Ballard,* 322 U. S. 78. In fact, petitioner was never in the Inactive Reserve provided for in paragraph 6 *a* (19) of the Army Regulations [Army Regulations 140-5, June 16, 1936], but he testified at the trial that he believed his ten years of commissioned status in the Officers' Reserve Corps between 1929 and 1939 gave him "inactive" status after expiration of his commission (R. 64, 68). When, as here, petitioner had made a full disclosure to the Draft Board of the facts on which

his opinion was based, at its specific request, long prior to the alleged reassertion, the injustice of treating the letter of May 14 as a false statement still outstanding, of which petitioner had "a certain and clear perception" (*United States* v. *Bittinger, supra*), is manifest.

It is significant that had petitioner been a member of the Reserve, he would have been exempt from registration under the Act, Sections 2 and 5, 50 U. S. C. App., Supp. V, Sections 302, 305. Hence his registration with the Board (R. 7-8) should have placed it upon notice that he was not in the Officers' Reserve Corps.

B. By reason of its dangerous tendency to enlarge the statute of limitations to the prejudice of defendants, the fiction of constructive republication is as pernicious as constructive contempt. An analysis of the application of this fiction emphasizes the point.

Petitioner has been convicted of the constructive crime of having reasserted by reference in February 1942, a letter of May 14, 1941 said to have been knowingly false. The indictment was returned on February 6, 1945. Prosecution for the original letter would then have been barred by the three year statute of limitations (18 U. S. C., Sec. 582). Review of the record discloses the great injustice to petitioner, the unfair enforcement of the Selective Training and Service Act, and the reprehensible circumvention of the statute of limitations for which the erroneous assumptions that there was (1) a republication (2) of an original false statement are responsible. Far from being a republication, the letter of February 10, 1942 was a good enough, indeed a complete, answer to the poorly phrased request for additional information sent on February 6, 1942. Submission of the issue of the "linkage" (R. 55) of the letters of May 14, 1941 and February 10, 1942 was indefensible. It is patent that the letter of February 10, 1942, referred to the entire complex of petitioner's dealings with the

board, including the inquiry of February 6, 1942, and the interview of May 21, 1941, and not solely to his letter of May 14, 1941.

Petitioner did not say, "My (military) status remains the same," stressing his early statement of May 14, 1941, but "My status has not been changed," stressing (1) absence of change (2) by outside agencies (3) after December 7, 1941. The variant statements are not identical in their suggestions. Although both would have been true, literally and in substance, petitioner's statement is harder to pervert.

C. Pervading the entire record is the confusion between false statements knowingly made and fraud, deceit, and misrepresentation. Notwithtsanding the Brief for the United States in Opposition, pages 13, 15, 17, the perpetuation-of-deceit analogy drawn from civil cases is mischievous. It is not enough that the answer of February 10, 1942 may have been deceptive or misleading—a man is not to be imprisoned for imprecise terminology, or a private vocabulary, or even woolly thinking. Neither is it pertinent what defendant should reasonably have believed his military status was, or how he might reasonably believe the Draft Board would interpret his letters of May 14, 1941 and February 10, 1942, or how it was interpreted by the board (R. 25-26, 31). The decisive question is what he intended—if he described his status to the best of his ability, he was not guilty as charged. Nor could he be guilty if he did not specifically intend to republish his statement of May 14, 1941. In the light of developments the Draft Board Chairman's letter of February 6, 1942, set a trap for the unwary. Although it should have been designed to elicit specific information it gave the jury a roving commission to imply (we cannot say "infer") the worst from any answer.

Section 11 of the Selective Training and Service Act so far as here pertinent applies only to persons who "*knowingly* make * * * any *false statement* * * * as to the fitness or unfitness or liability or nonliability * * * for service under the provisions of this Act * * *." (Italics supplied.) If the letter of February 10, 1942 looked beyond the inept Draft Board request, it had reference to the totality of the dealings petitioner had with the Draft Board and its employees, in the course of which all the material facts of his connection with the Officers' Reserve Corps were drawn to their attention. Review of the earlier statement in the light of the subsequent "substantiation" reveals it as a wrong characterization rather than a false statement, for the petitioner had accurately supplied the facts upon which his conclusion was based (R. 43-45, 103). Whatever misleading (not false) qualities it may have had were dissipated by petitioner's elaboration on May 21, 1941.

If the issue had been whether petitioner had obtained credit, or an extension of credit, on February 10, 1942, by means of a materially false statement respecting his financial condition (Section 14 (c) (3) of the Bankruptcy Act, 11 U. S. C., Section 32 (c) (3)) and the critical dates were the same, i. e., if on May 14, 1941, he had failed to mention a debt, and on May 21, 1941, had rectified the omission, it is unthinkable that a discharge in bankruptcy would be denied because on February 10, 1942 petitioner had told the lender his condition "had not been changed." Once the initial misleading statement had been corrected by disclosure of all the details on May 21, 1941, the mere failure of the lender's agent properly to record the interview would not keep the misleading statement alive and unmodified, and forfeit the right to a discharge. The allegedly false statement would not have remained in force and binding on the bankrupt. *Cf. Gerdes* v. *Lustgarten,* 266 U. S. 321, 326; *Crue* v. *Trimmer,* 119 F. (2) 415

(C. C. A. 6); *Schapiro* v. *Tweedie Footwear Corp.*, 131 F. (2) 876 (C. C. A. 3); *International Shoe Co.* v. *Kahn*, 22 F. (2) 131 (C. C. A. 4).

D. Thus there were two prime errors:

FIRST: Submitting the question of the *reassertion* of a *false* statement to the jury, when without speculation and with due regard for the presumption of innocence, the jury could not have resolved either issue in favor of the prosecution, and

SECOND: In creating a new crime of partial and selective (constructive) reassertion of statements without any conceivable justification except the dubious expediency of enlarging the time within which the Government may prosecute for allegedly false statements. *United States* v. *Kissel*, 218 U. S. 601, 607; *United States* v. *Irvine*, 98 U. S. 450; *Warren* v. *United States*, 199 F. 753 (C. C. A. 5).

The truthful short answer of February 10, 1942 has been distorted, rewritten and supplemented to circumvent the three year statute of limitations. The Circuit Court erred in holding that whether the earlier letter was an utterly false statement knowingly made was an issue solely for the jury. *United States* v. *Buckley*, 49 F. Supp. 993 (D. D. C.). Unless the jury might find that the letter of May 14, 1941, was incurably false, the Circuit Court could not have upheld submitting to the jury the question whether the most malignant construction should be put on petitioner's answer of February 10, 1942. Seen in its proper perspective, the letter of May 14, 1941 cannot be separated from petitioner's course of dealing with the Draft Board and deemed reasserted in the letter of February 10, 1942. The information petitioner supplied immediately following the Draft Board's request on May 16, 1941 for substantiation of his statement that he was commis-

sioned in the "inactive reserve of the United States Army" (R. 24, 111), should have effaced any misimpressions created in the Draft Board by his letter of May 14, 1941. But however misled the board may have been, petitioner's correction of the misimpression would have put his mind at ease even if he had been aware that he had mistakenly or wrongly described his military status. If unaware that he had erroneously described his status, petitioner could not knowingly have reasserted a false statement. And however blameworthy petitioner's conclusory statement of May 14, 1941 may have been, no false statement knowingly made and uncorrected survived for incorporation in the letter of February 10, 1942.

To support the conviction, so many unsupportable inferences unfavorable to petitioner must be drawn that one is at a loss to understand how denial of a directed verdict of acquittal might be sustained. The jury would have to be capable of describing petitioner's status accurately, of differentiating between a false statement and a mistaken characterization, and between the specific intention to reassert and an imputed intention. Assuming there was sufficient evidence for the jury to find that petitioner specifically intended to reassert his statement of May 14, 1941, it would have to find (a) that the statement was false, rather than a mistaken characterization or misconception; (b) that petitioner knew it was false; (c) that despite his age, his myopia, marital status, and essential occupation, petitioner's motive was to falsify; and (d) that although he had theretofore and on May 21, 1941 disclosed all the facts as to his commission he unaccountably chose on February 10, 1942 to republish only his letter of May 14, 1941.

E. If the evidence was equally consistent with the hypothesis of innocence, a verdict of acquittal should have been directed. The answer of February 10, 1942 was not a

representation that the status shown on May 14, 1941 continued but that the status (since the declaration of war) had not been changed. For its malignant construction the Government must then supply language to the effect that status as shown in May 14, 1941, still continued, and then proceed to establish *scienter* and falsity. Unfortunately for its position, the analysis of the Circuit Court and the brief in opposition was not available to the jury or the defendant. The jury was in no position to determine what a truthful answer would have been nor to evaluate the latitude that might be allowed petitioner in describing his military status. Since republication requires specific intent, the question is not what the Draft Board's letter of February 6, 1942 intended to ask (R. 31) but what petitioner thought it did, and what antecedent status he intended to say continued. The jury certainly could not be left free to pick and choose only the fragments of evidence unfavorable to petitioner, to disregard his interview and frank disclosure of the facts, and convict petitioner for having republished only such select portion of his previous statements as was arguably false, without regard to the total effect.

In the circumstances of this case, it was the clear duty of the trial judge to rule preliminarily that too many ambiguities had to be resolved against petitioner to justify submission to the jury, or else to direct a verdict of acquittal *United States* v. *Buckley,* 49 F. Supp. 993 (D. D. C.); Rule 29, Federal Rules of Criminal Procedure, 18 U. S. C. A., following Section 687; *Karn* v. *United States* 158 F. (2) 568, 573 (C. C. A. 9).

The individual injury, grievous as it is, only highlights the public concern with criminal law procedures and evidentiary standards that permit substitution of layer upon layer of inference for proof of guilty intent, and with criminal law safeguards that permit resort to the fiction

of constructive republication as a device to evade the statute of limitations. The statute of limitations embodies protections too ancient and deeply rooted in public policy for its nullification to be accepted complacently. Invocation of constructive republication as the device for nullifying its protection presents such disturbing opportunities for serious abuse as to require this Court to intervene and review the matter on certiorari.

Conclusion.

For the foregoing reasons, petitioner respectfully urges that a rehearing be granted; that upon further consideration the order of March 3, 1947, denying the petition for certiorari, be revoked; and that the writ of certiorari issue.

LOUIS NIZER,
Attorney for Petitioner.

I, Louis Nizer, counsel for the above-named petitioner, Max Louis Peskoe, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

Louis Nizer
Attorney for Petitioner.